NO 81 5944

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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SUPREME COURT, U.S.

CHARLES DWIGHT MESSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
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(MEMBER OF THE BAR OF THIS COURT)

APPENDIX

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tences imposed on Archie and the defendant, we find that they are justified under the circumstances. In contrast to the active role played by defendant throughout the robberies and murders, Archie served only as the wheelman whose role was limited to driving the defendant and the two other intruders to Stocker's residence. He met with them again at the motel room after the entire episode was over. The defendant's moral and legal culpability was, in our opinion, much greater than Archie's. Hence, we cannot conclude based on our review of this case and other cases in which the death sentence was imposed, that the defendant has been treated differently upon substantially similar circumstances. We hold that the death sentence has been imposed on the defendant consistent with the equal administration of justice.

For the foregoing reasons, we affirm the conviction of the defendant on all counts as charged and affirm the imposition of the death sentence.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

ADKINS, J., concurs in result only.

Charles Dwight MESSER, Appellant,

v.

STATE of Florida, Appellee.

No. 49780.

Supreme Court of Florida.

June 4, 1981.

Rehearing Denied Oct. 1, 1981.

Defendant's conviction for first-degree murder and robbery was affirmed by Supreme Court, 330 So.2d 137, but the sentence of death was vacated and remanded for a new sentencing proceeding. On appeal after this hearing was held, the Supreme Court, 384 So.2d 644, remanded for another hearing. On remand, the Circuit Court, Santa Rosa County, Clyde B. Wells, J., imposed the death sentence, and defendant appealed. The Supreme Court held that the trial court's findings supported the sentence of death.

Affirmed.

1. Criminal Law ⇐986.5

Evidence in sentencing hearing supported finding that sentence of death for first-degree murder was imposed without consideration of information not disclosed to defendant prior to sentencing.

2. Criminal Law ⇐986.6(1)

In sentencing hearing following conviction for first-degree murder, it was within discretion of trial court to allow State to explain to jury, through testimony of state attorney, reasons for seemingly disparate treatment by state attorney between defendant and accomplice in accepting guilty plea to second-degree murder from accomplice and in prosecuting defendant for first-degree murder.

3. Criminal Law ⇐986.2(4)

In sentencing hearing following conviction for first-degree murder, defendant's manslaughter conviction in another state was admissible as relevant to statutory aggravating circumstances. West's F.S.A. § 921.141.

4. Criminal Law ⇐1177

In sentencing hearing following conviction for first-degree murder in which death penalty was imposed, error in trial court's consideration of circumstances of crime in making two findings, that murder was committed in course of robbery and that it was committed for pecuniary gain, which both related to same aspect of crime, was harmless.

5. Homicide ⇐354

In prosecution for first-degree murder, trial court's findings made after sentencing trial supported sentence of death.

Theodore E. Mack, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Wallace E. Allbritton, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal of a sentence of death imposed for the capital felony of murder in the first degree. This Court previously affirmed the conviction for first-degree murder and robbery, but vacated the sentence of death and remanded for a new sentencing proceeding before a jury. *Messer v. State*, 330 So.2d 137 (Fla.1976). A new jury was empaneled and a second sentencing proceeding was held. The trial court again sentenced appellant to death and this appeal followed.

On March 22, 1977, the Supreme Court of the United States decided *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), holding that due process is denied when the imposition of a sentence of death is based, even if only in part, on information which the defendant has no opportunity to deny or explain. Subsequently, on June 16, 1977, this Court entered an order in the instant case directing the sentencing judge to state whether he imposed the death sentence in consideration of any information not known to the appellant.

On September 26, 1977, the trial court filed a response. This Court's consideration of the appeal then continued until April 26, 1979, when we issued an opinion announcing our decision to affirm the sentence of death. *Messer v. State*, No. 49780 (Fla., April 26, 1979) (opinion withdrawn). On motion of the appellant for rehearing, however, based on a discrepancy between the trial court's response to our *Gardner* order and other documents of record, we withdrew the opinion of April 26, 1979, and, on November 8, 1979, remanded for a *hearing* on the question of a possible violation of the *Gardner* principle. *Messer v. State*, 384 So.2d 644 (Fla.1979).

The trial court held a hearing for the purpose of inquiring whether the sentence of death was imposed in consideration of any information not disclosed to appellant or any reports not furnished to him prior to sentencing. A lawyer from the office of the Public Defender for the First Judicial Circuit, which office had previously represented the appellant at trial, was present, but had moved to withdraw from representation due to conflict of interest. A lawyer from the office of the Public Defender for the Second Judicial Circuit, who was serving as appointed appellate counsel, notified of the hearing, but informed the court of his view that he was without authority to represent the appellant at trial-level proceedings or outside the second circuit. The judge then ruled that there was no need for appellant to be represented at the hearing and proceeded with the inquiry.

When the findings were received by this Court, we held that the proceeding was deficient in that appellant was entitled to be represented by counsel at the hearing. On June 5, 1980, we remanded for another hearing to inquire whether the sentence of death was imposed by a judge who considered information not disclosed or reports not furnished to appellant, and directed that his appellate counsel represent him at such hearing. *Messer v. State*, 384 So.2d at 645 (Fla.1980).

Another hearing on the question of a *Gardner* violation was held by the trial court, and we are in receipt of the transcript and the judge's written findings. The findings are reported to us as follows:

> THIS CAUSE is before this court on remand from the Supreme Court of the State of Florida, opinion filed June 5, 1980, 384 So.2d 644.
>
> The purpose of remand was for this court to conduct a further hearing to determine whether the sentence of death of the appellant was imposed in consideration of any information not disclosed to

the defendant or not furnished to him prior to sentencing.

At the hearing, appellant was personally present with counsel and the State of Florida was represented by the State Attorney's Office of the First Judicial Circuit, all proceedings were duly reported. The trial judge in the case recused himself because he had been subpoened [*sic*] by appellant's attorney as a material witness.

The hearing was heard by the undersigned circuit judge. The State of Florida called two witnesses, M. J. Livings, who is employed by the Florida Probation and Parole Office. He testified he had conducted a postsentence investigation on the defendant. The testimony reveals that he never furnished a copy of the postsentence investigation to the presiding judge and that such postsentence investigation was conducted after the first hearing but prior to the second sentencing hearing. That there were 5 copies, one went to the Executive Clemency Committee and he retained four copies; that he had never discussed the report with Judge Wells and he put a copy of the report in the file but it was not during any sentencing proceeding. He testified at the time of the original sentencing there was no presentence investigation or postsentence investigation or reports. Honorable Clyde Wells, Circuit Judge, First Judicial Circuit, was called as a witness and testified that he sentenced the defendant on two occasions; that he did not order a presentence investigation and that he never saw any reports prior to sentencing or talked to any probation officer and he had no other information prior to sentencing. He further testified that the Supreme Court requested under *State v. Gardner* rule, if he had any other information at the first sentencing. He originally replied there was a presentence investigation, but the mandate had come to him in Walton County his residence and he had replied without checking and had made an erroneous statement that he had a presentence investigation when in fact he did not. He testified he had not had a presentence investigation and he did not have the benefit of any other information; he never requested a presentence investigation because there was a tremendous amount of information involved in the trial of the case and he had found in many instances presentence investigations sometimes contain information that was not available to defendants. His testimony indicated if he had used a report it would have been made a part of the record. He testified that the postsentence was done before the second sentencing but he still has not used the postsentencing report.

The Court points out the postsentence referred to is in the court file and the testimony was it was conducted for the Executive Clemency Board or Commission and not at the behest of or for the court.

Based on the above, it is the opinion of this court and this court finds that the sentence of death was imposed without consideration of any information not disclosed to the appellant or reports not furnished to him prior to the sentencing.

Respectfully submitted this 2nd day of October, 1980.

[1] Having reviewed the transcript of the hearing, we find that the court's findings are amply supported by the evidence. We also conclude that the court's report has adequately disposed of the discrepancy we noted in our order on rehearing, dated November 8, 1979. *Messer v. State*, 384 So.2d at 644.

Having disposed of the *Gardner* problem, we are now in position to review the second sentencing proceeding and consider the propriety of the sentence of death.

The facts as stated in our earlier opinion, and based on Messer's confession, were that appellant and Ronnie Brown stopped at an interstate highway rest area where they found Henry Fowler sleeping in a car. They entered the car and robbed him of his valuables, including a watch and $120.00. Then they drove the car, with the victim as

their captive, to several locations. Ultimately Brown struck the victim, and appellant shot him in the head. *Messer v. State*, 330 So.2d 137, 139 (Fla.1976).

There were two procedural defects this Court found in the initial sentencing proceeding.

First, although there is evidence in the record of the plea-bargained second degree murder sentence received by appellant's accomplice Brown, appellant was not permitted, during the sentencing portion of the trial, to submit this evidence to the jury. We believe the jury was entitled to know that the co-defendant, Ronnie Brown, negotiated a plea of guilty to second degree murder and was sentenced to 30 years imprisonment. See *Slater v. State*, 316 So.2d 539 (Fla.1975). Although the *Slater* case, *supra*, involved evidence that the "trigger man" was permitted to negotiate a plea for a sentence of life imprisonment, under the facts of this particular case we believe the reasoning of *Slater* applies with equal force. It was there stated, "Defendants should not be treated differently upon the same or similar facts." In the instant case, although the appellant did fire the shot into the head of the victim, this shooting occurred after Brown took a wallet containing $120 and a watch from the victim, then struck him in the back of the head. There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent. The sentence afforded to Brown certainly is not determinative of the sentence which appellant should receive; however, the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation of the sentence to be visited upon the appellant.

Additionally, we believe counsel for the defendant was effectively deprived of establishing an important mitigating circumstance when he was not afforded the opportunity to present psychiatric testimony to the jury during the sentencing portion of the proceedings. Subsection 921.141(6)(b), Florida Statutes, provides as a mitigating circumstance that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." Counsel for the appellant represented to the court that, if given the opportunity, he would come forward with evidence establishing such condition. The expression by the trial court that the verdict of the jury is merely advisory and that he could consider psychiatric reports at the time he performed the actual sentencing, in our opinion, violates the legislative intent which can be gleaned from Section 921.141, Florida Statutes. It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as ar integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation. Subsection 921.141(1), Florida Statutes, provides in part:

> "... In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) [sic] and (7) [sic] [of this section]. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements...."

The quoted language indicates that the circuit judge should exercise the broadest latitude in admitting evidence during the sentencing portion of the jury's deliberations.

Messer v. State, 330 So.2d at 141–42.

On remand, a special jury was empaneled for the purpose of making a sentencing recommendation. At a pre-trial conference, the defense moved that the jury be apprised of the facts and circumstances of the crime by having read to them the statement of

facts found in this Court's opinion filed when the previous appeal was decided. The state opposed the motion, arguing that in order for the jury to be fully apprised of the circumstances, the state should be permitted to present the evidence of the crime substantially as it had been presented at the first trial. The judge stated that he wished to avoid holding the entire trial over again, but that he also felt that to read a statement of facts from this Court's opinion would be inadequate. Accordingly, the state was allowed to present evidence relating directly to the facts of the crime.

According to the testimony presented, the victim's body was found by two hunters on the morning of November 27, 1973. The body was dressed in a pull-over karate jacket and green trousers. A pathologist testified that the cause of death was a bullet wound to the brain. There was also a laceration on the back of the head indicating that the victim had been struck with a metal instrument of some kind. An officer who inspected the body at the scene testified that the cut was vertical. The pathologist who performed the autopsy testified that the laceration was horizontal and was about two inches long. The cut, according to the pathologist's testimony, went through the scalp and penetrated the muscle tissues under the scalp, but did not penetrate, nor did it fracture, the skull. This cut could have been inflicted by striking the victim with a pistol. The only part of a pistol that could have caused such a cut is the sight blade. To hold a pistol in such a way as to achieve the leverage to make such a cut, the expert said, would involve considerable awkwardness. The laceration could have been inflicted with a tire tool, as claimed in appellant's confession, but a blow with a tire tool would more likely have fractured the skull.

Witness Richard Knapp testified that he last saw his friend Henry Fowler on November 26, 1973, at Knapp's home in Semmes, Alabama, near Mobile. They had travelled together to Louisiana for the Thanksgiving holidays. After leaving Knapp at his home, Fowler was to drive on to Dothan. Knapp said that Fowler had a little over $100 on his person when he left. His car trunk contained a spare tire and some wrenches. Fowler was wearing a white karate jacket. When police recovered Fowler's car, the spare tire and tools were gone.

The state introduced in evidence a .32 caliber pistol. Lewis Hancock testified that he owns a small grocery store in Esto, Florida, about twelve miles north of Bonifay. One day in late 1973, Messer came into the store saying that he had an emergency call and had to go to Birmingham. He wanted to borrow forty or forty-five dollars and to leave as security a .32 caliber pistol resembling the one in evidence. Hancock loaned him the money, but Messer never came back for the gun. Hancock later turned the weapon over to an officer of the Florida Department of Criminal Law Enforcement.

Shawn Ingram testified that he worked as a sales clerk at the Western Auto Store in Bonifay. He had known Ronnie Brown since grammar school. On November 24, 1973, he sold a pistol to Ronnie Brown. The state presented, and Ingram identified, a written record of the firearm sale. The serial number matched the one on the pistol in evidence. Under the law regulating sales of firearms, Ingram testified, he was required to ask Brown certain questions, including whether he had ever been convicted of a crime. Ronnie Brown answered this question in the negative and Ingram said he had no reason to disbelieve him. Ingram testified further that the appellant Messer was present when Brown bought the gun.

The state and the defense stipulated that the bullet removed from the body of Henry Fowler was fired from the gun purchased by Ronnie Brown and introduced in evidence.

Curtis Golden, State Attorney for the First Judicial Circuit, was called as a witness for the state. He testified that on January 17, 1974, he went to Anniston, Alabama to interview Messer. Messer's original stated reason for consenting to the interview was to clear his conscience because he had knowledge of a murder that had

taken place along the interstate highway in Florida. He asked for immunity from prosecution. Golden refused, telling Messer he could not consider that until he knew what the information was.

Messer then indicated he would tell about the murder anyway. Golden advised him of his constitutional rights and proceeded with the interview. Golden asked Messer about his education level and Messer claimed he had completed two years of junior college. Golden's subsequent investigation did not include any attempt to verify this information. The initial interview was recorded on tape.

In his first statement, Messer said that he, Ronnie Brown of Bonifay, and one Ray King of Bonifay were all together when King killed Fowler. Golden testified that he was dissatisfied with this statement because of certain inconsistencies between the factual details of it and certain facts already revealed by the investigation. For example, Messer said King robbed Fowler of some $8,000 in cash of small denominations, an amount impossible to carry in the pockets of a karate jacket. So, the next day, he interviewed Messer again. Messer changed his story in certain particulars, but still maintained that the murder was committed by the man named Ray King.

Lt. Jesse Cobb, a Santa Rosa County sheriff's investigator, testified that on January 23, 1974, he was present along with Santa Rosa County Sheriff Enfinger, Sheriff Snead of Anniston, Alabama, and Mr. Ronnie Cornelius of the Florida Department of Criminal Law Enforcement, when Messer led them to the scene of the crime. This took place after Messer had already given two statements in which he said that Ray King had murdered Fowler. Messer also showed the officers the highway rest area where Fowler's car was left after the murder.

Florida state crime investigator Ronnie Cornelius testified that he participated in the investigation and went to Anniston with Mr. Golden and Lt. Cobb on January 17, 1974. On January 21, 1974, Cornelius telephoned Ronnie Brown, who was in Arlington, Texas. Cornelius told Brown that he was investigating the sabotage of county equipment in Holmes County. Cornelius had reason to know that Brown would have some awareness of the existence of such an investigation. He told Brown that he needed to talk to him in order to get the investigation "cleared up." He asked Brown whether, if the State of Florida would pay his air fare, he would be willing to return to Florida for questioning.

Brown came to Florida and was interviewed on the 21st and 22nd of January, 1974. Therefore when the investigators commenced their third interview with Messer on January 23, they had the advantage of what they had learned from Brown. A fourth and final statement was taken from Messer on the afternoon of the 23rd, following which he was placed under arrest for first-degree murder and robbery. The tape-recorded statement was played for the jury.

As was stated in this Court's opinion of March 31, 1976, Messer's final statement was that

> he and Brown had been traveling on the Interstate Highway, he had been drinking liquor and beer, and they stopped at a rest area to look for toilet facilities. When they stopped, they decided to rob the victim, who was asleep in a parked car in the rest area. The pair entered the victim's car, held him up, drove him to several locations; ultimately Brown struck the victim, and appellant shot him once in the head. Brown had previously taken the victim's wallet and watch, and the pair divided $120.00 and disposed of the victim's wallet, personal effects, and car tag.

Messer v. State, 330 So.2d at 139. At the second sentencing hearing, however, the state's witnesses testified that while Brown admitted participating in the robbery and murder, in none of his statements did he admit any participation in the actual perpetration of physical violence against Henry Fowler.

Over defense objection, the court allowed the state to elicit from Curtis Golden the

reasons underlying his exercise of prosecutorial discretion. It was his decision to seek the death penalty against Messer while accepting Brown's plea of guilty to second-degree murder. This Court held that Messer should have been allowed to apprise the jury of this disparate treatment. On remand, the court below held that the state was entitled to present the reasons underlying the exercise of discretion that brought about this result.

Mr. Golden testified that he learned that Messer and Brown met when Messer was in jail in Bonifay, where Brown's brother-in-law worked as a juvenile counselor. Golden took into consideration that Brown had not been involved in any criminal activity until he met Messer. Golden concluded that Messer was the leader, Brown the follower in the criminal episode that led to Henry Fowler's death.

Golden testified that he believed both men participated in the abduction and robbery of Fowler, and that both were therefore equally guilty of murder in the first degree. He believed that he could have secured convictions of both men for such crime. He believed, however, that because of Brown's lower intelligence and education, he would have been able to establish mitigating circumstances, under the capital felony sentencing law, based on his subordinate role and domination by Messer. Golden believed that on this basis Brown would likely be able to secure a jury recommendation of, and sentence to, life imprisonment. The maximum penalty for second-degree murder is life imprisonment, Golden reasoned, so he decided to allow Brown to plead guilty to second-degree murder in order to spare the state the expense of a trial. No particular sentence or sentence recommendation was promised Brown in exchange for his plea. Golden said he expected Brown to be sentenced to life imprisonment.

Brown actually received a sentence of thirty years imprisonment, and the jury was apprised of this fact. The jury was informed as well that when one convicted of first-degree murder is sentenced to life imprisonment, he is not eligible to seek parole for twenty-five years, while the parole eligibility of a person sentenced to thirty years is profoundly different.

Golden testified further that with regard to Messer's case, he foresaw that the state would be able to establish several aggravating circumstances, and believed there were no mitigating circumstances. He also considered the fact that Brown admitted guilt before Messer did; Brown's cooperation and statements assisted in the solving of the crime, while Messer attempted to implicate a third, totally innocent man.

Following the state attorney's testimony about the reasons underlying his exercise of prosecutorial discretion, defense counsel moved that the court direct a verdict recommending life, and impose a life sentence. The defense based the motion on the ground that the state attorney's testimony demonstrated that he had exercised his discretion arbitrarily. A proper application of the death penalty statute, defense counsel argued, requires consistency, not arbitrary distinctions in determining the relative culpability of joint perpetrators.

The sentencing judge asked defense counsel to explain why the state attorney's exercise of discretion with regard to the case against Brown, whether it was proper or improper, had anything at all to do with the question of what sentence should be imposed upon Messer. After further argument, the court denied the motion.

The state presented the testimony of Dr. Anthony Semon, clinical psychologist. Dr. Semon examined Messer in December, 1974. He concluded that Messer was of average intelligence but that there were some indications of mental problems. His examination led him to the "hypothesis" that there may have been some impairment of the inhibitory functions of Messer's brain, but since he performed only a cursory examination rather than a "complete neurological work-up," this remained only a "hypothesis."

Dr. Semon testified that he also examined Brown. His examination of Brown was more detailed and included intelligence,

neuropsychological, and personality tests. The doctor concluded that Brown's intelligence was substantially below normal and that he suffered from some possible brain damage. As to personality, Dr. Semon characterized Brown as "a follower," a person who accommodates himself to the demands of others. Based on these conclusions, Dr. Semon gave his opinion that during the criminal episode Brown's capacity to understand the character of his actions was probably impaired and he was probably acting under the domination of Messer.

The state introduced a certified record from the State of Alabama showing that on October 3, 1974, Messer was convicted of manslaughter pursuant to a plea of guilty, based upon a crime that occurred on January 14, 1974.

The defense presented the testimony of Dr. Elizabeth McMahon, clinical psychologist. She testified that on May 15, 1976, she examined Messer for eight and one-half hours. She administered intelligence, neuropsychological, and behavioral tests. She had access to previous evaluations performed on Messer in 1974, including the preliminary conclusion or "hypothesis" of Dr. Semon concerning possible problems of brain functioning.

Dr. McMahon concluded that Messer evidenced a very mild pattern of cerebral dysfunctioning. What she found was indicative of a mild form of epilepsy, which, she said, is often caused by repeated trauma to the head. Dr. McMahon pointed out that this condition is not the *grand mal* form of epilepsy that is associated with severe seizures, but involves mild, "subclinical" seizures which cause a reduction in the efficiency of cerebral functioning.

The psychologist testified further that she concluded that Messer was an emotionally stunted person. That is, he has weak emotional controls that break down under stress. He has limited capacity to control his impulses. Dr. McMahon characterized Messer's personality type as "passive-reactive," and explained that this means he tends to react to, rather than act upon, his environment.

On cross-examination by the state, Dr. McMahon stated that Messer's problems of mental dysfunction are mild, not extreme.

On rebuttal the state presented the testimony of Dr. Theodore Marshall, a psychiatrist. He testified that he examined Messer for ninety-five minutes on December 13, 1974. The examination was performed pursuant to court order for the purpose of determining Messer's mental condition. Dr. Marshall testified that he found Messer to be coherent and that he manifested no dissociation of thinking.

After hearing the arguments of counsel, the jury deliberated and returned a verdict recommending that the court sentence Messer to death. The sentencing judge made the following findings:

FINDINGS OF FACT

Pursuant to Section 921.141(3), the Court makes the following findings of fact which constitutes the justification for the imposition of the sentence herein administered:

a. That the crime of First Degree Murder was committed while the Defendant was in the process of committing the crime of robbery (for which he has likewise been convicted).

b. That the crime was committed for pecuniary gain in that the Deceased was robbed of $120.00, and other property at the time of the commission of this offense.

c. That the murder was committed in a manner the Court finds to be especially atrocious and cruel in that the victim was taken in his automobile at gun point to two different locations, was required to get into the trunk of his automobile where he was transported, repeatedly told the Defendant he had no intentions of resisting, and finally was hit over the head and shot and left to die in the woods.

d. That by the Defendant's own statement his last 15 years were devoted to criminal behavior, but specifically finds that the Defendant was previously convicted of the crime of manslaughter.

e. That the Defendant was the leader of the two co-defendants, and that the sentence received by the Defendant, Brown, (which was not passed by this Court) is not a justification for this Defendant receiving a lesser sentence.

f. The Court has reviewed those mitigating circumstances contained in Section 921.141(6)(a) through (g), and finds that none of those mitigating circumstances are present. In making this finding, the Court has considered the testimony of the two clinical psychologists and the psychiatrist who testified, none of whom diagnosed the Defendant to have been suffering any extreme mental or emotional disturbance at the time of the commission of the offense.

Based on the above findings, the Court concludes that sufficient aggravating circumstances exist to require the sentence of death in the electric chair, and that no mitigating circumstances exist which would allow this Court to reduce that sentence to life imprisonment.

Appellant contends that the court erred in allowing State Attorney Golden to testify concerning his opinion of the relative culpability and characteristics of Messer and Brown; that the Alabama manslaughter conviction should not have been admitted into evidence; that the court erred in its evaluation of the aggravating and mitigating circumstances; and that application of the death penalty to Messer is unconstitutional because it is the result of arbitrary prosecutorial discretion.

[2] In his initial appeal of his conviction and sentence, Messer successfully maintained that he should have been allowed to tell the jury that Brown had been allowed to plead guilty to second-degree murder and had received a thirty-year sentence. *Messer v. State*, 330 So.2d 137 (Fla.1976). We hold that it was within the discretion of the trial court to allow the state to explain to the jury, through the testimony of the state attorney, the reasons for the seemingly disparate treatment.

[3] The Alabama manslaughter conviction was admissible as relevant to a statutory aggravating circumstances. *See Elledge v. State*, 346 So.2d 998 (Fla.1977).

[4] The only error we find in the judge's consideration of the circumstances of the crime is that the finding that the murder was committed in the course of a robbery and the finding that it was committed for pecuniary gain both relate to the same aspect of the crime. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). This error, however, was harmless. *Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

Appellant's contention that the exercise of prosecutorial discretion renders the capital felony sentencing law unconstitutional as applied to his case is without merit. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

[5] Having provided careful review of the sentencing trial and the court's findings, we affirm the sentence of death.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

Elton E. ENSOR, Petitioner,

v.

STATE of Florida, Respondent.

No. 57817.

Supreme Court of Florida.

June 4, 1981.

Rehearing Denied Sept. 25, 1981.

In prosecution for carrying a concealed weapon, the Circuit Court, Orange County,

IN THE SUPREME COURT OF FLORIDA

CHARLES DWIGHT MESSER, :

Appellent, :

v. : CASE NO. 49,780

STATE OF FLORIDA, :

Appellee. :

_____ :

MOTION FOR REHEARING

Appellant, CHARLES DWIGHT MESSER, by his undersigned counsel, hereby moves this Court pursuant to Florida Rule of Appellate Procedure 9.330(a) to grant rehearing on the issues raised in this appeal and respectfully suggests that this Court overlooked or misapprehended the following:

1. On April 26, 1979 this Court issued an opinion in this case upholding appellant's sentence of death. In his petition for rehearing filed on May 10, 1979, appellant raised five issues questioning that opinion. Pursuant to the petition for rehearing this Court withdrew its opinion and ordered a hearing be held in the trial court based on the first issue raised in appellant's petition. When the trial court failed to properly conduct such a hearing, this Court issued an order on June 5, 1980, remanding for another hearing and appointing counsel. After such hearing was held the trial court issued its findings and this Court then entered its opinion dated June 4, 1981, in which appellant's sentence of death was again upheld.

2. Undersigned counsel would first point out that this Court's opinion of June 4, 1981 contains a misstatement of fact at page two (2) when it asserts:

> A lawyer from the office of the Public Defender for the Second Judicial Circuit, who was serving as appointed appellate counsel, was also present, but announced his view that he was without authority

> to speak for appellant at trial-level proceedings or outside the second circuit.

Appellate counsel would point out that he was not present at that hearing since he did not receive notice until the day before the hearing and was of the correct opinion that he did not have statutory authority, absent appointment by this Court, to travel to and practice in another circuit at the trial level. Only after this Court's appointment did undersigned counsel travel to the First Judicial Circuit to represent appellant. Undersigned counsel prays the Court will correct this misstatement because the wording of the opinion makes it appear asif he traveled from Tallahassee, Florida to Milton, Florida only to antagonize the trial judge into committing error. For a correct statement of the facts, see appellant's motion to strike filed January 21, 1980.

3. Appellant would next point out that in its first opinion issued on April 26, 1979, this Court stated at page three (3):

> "The state sought to present this testimony in order to counter any inference, unfavorable to the state's case on this issue of sentence, that the jury might draw from being informed of the final disposition of the charges against the accomplice. The testimony also tended to negate various statutory mitigating circumstances. We hold that the state attorney's testimony was relevent for these purposes and was properly admitted." (emphasis added)

After finding that it was proper for the State Attorney to testify in order to negate various mitigating circumstances, this Court went on to find at page three:

> "We find further from the record that there was no evidence tending to establish the existence of any mitigating factors. The sentence of death was proper."

Appellant, in his petition for rehearing, filed on May 10, 1979 questioned why, if there were no mitigating

factors, would the State Attorney be allowed to testify to negate them. On the other hand, if the State Attorney had to be allowed to testify to negate mitigating factors, then evidence of mitigating factors must have been present that the jury could have considered. It appeared as if the decision allowed the state to have its cake and eat it too. Appellant noted that the problem could have been resolved in one of two ways, either by finding that no mitigating factors existed, thus requiring a new sentencing proceeding wherein the state attorney would be prohibited from testifying, or, in the alternative, by finding that mitigating factors did exist, in which case a new sentencing hearing would be required based on the fact that this Court had ruled out all but two of the aggravating factors argued below. See Elledge v. State, 346 So.2d 998 (Fla. 1977).

This issue on rehearing was similar to another issue raised by appellant concerning the State Attorney's testimony that it was his opinion that the aggravating factors outweighed the mitigating factors. Appellant pointed out that this went directly to the issue to be determined by the jury and therefore was error as an invasion of the providence of the jury.

In its latest opnion of June 4, 1981, this Court withdrew the above-cited language but failed to explain what had happened to the mitigation mentioned in its April 26, 1979 opinion. In addition, this Court again failed to point out why the State Attorney should be allowed to give his opinion as to the weighing of the aggravating and mitigating factors. The Court only stated:

> We hold that it was within the discretion of the trial court to allow the state to explain to the jury, through the testimony of the state attorney, the reasons for the seemingly disparate treatment.

Appellant has no problem with this statement and notes that the state was allowed to do such. But the record shows that the state went too far when it used this pretense to allow the State Attorney to go on to argue from the witness stand that there were no mitigating factors to be considered. As this Court has held time and again, the jury may consider non-statutory mitigating factors in reaching it determination. The statements of the State Attorney clearly precluded any possibility of the jury making such a consideration in the instant case and it is obvious from the language used by this Court in its April 26, 1979 opinion that the possibility of mitigation in the instant case did exist. The only way to clear up this question is to hold a new sentencing hearing at which the State Attorney is advised not to give his opinions and the jury is advised that there are only two aggravating circumstances to be weighed against possible non-statutory mitigating circumstances.

4. This Court, in issuing its opinion, has also failed to respond to appellant's second point raised in his petition for rehearing filed on May 10, 1979. That point raised the question of a psychological screening report that was forwarded to this Court by the then Department of Offender Rehabilitation. Appellant requested in his petition and continues to request in this motion that the Court determine if and when it received that report, if and when that report was destroyed, and whether or not that report was read and considered by any members of this Court.

Appellant previously indicated that the receipt of the report by this Court would be a direct violation of Gardner v. Florida, 430 U.S. 349 (1977). Appellant is well aware of the opinion of this Court in Brown v. Wainwright, 292 So.2d 1322 (Fla. 1981) but believes that the Brown

decision is erroneous and was based on a misinterpretation of Gardner. As noted in Gardner, the sentencing process in a case involving the imposition of death must satisfy the requirements of the Due Process Clause. The United States Supreme Court clearly stated that:

> The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. 430 U.S. 349 at 358.

In attempting to avoid the protective cloak of Gardner, this Court, in Brwon, argued that it did not "impose" sentence when it reviewed a death case. Such reasoning is illogical since this Court's affirmance of a death sentence clearly acts as part of the imposition of the sentence by the State. This Court is, by statute, a necessary step in the ultimate infliction of death. As such, it imposes the sentence just as surely as the trial judge below or the governor who signs the warrant. The State of Florida, through its laws, imposes the death sentence and not the trial judge alone. Gardner speaks of the process as set forth in the statute and this Court, in going outside the statute, violated Gardner.

Appellant would note in support of this point that this Court must have felt its actions were in some way improper since it destroyed the documents and no longer continues this practice. In light of this, appellant feels that the Court should specifically respond to his questions concerning the psychological report because he was affected by this process before it was stopped. Additionally, the Court should answer appellant's questions concerning the report so that he may properly preserve the facts for possible appeal to the federal courts.

WHEREFORE, appellant prays the Court will grant rehearing in this case, correct its opinion and remand for

a new sentencing proceeding in accordance with this Court's findings relating to the aggravating and mitigating circumstances present. In the alternative, appellant prays this Court will respond to his questions concerning the secret psychological report.

Respectfully submitted,

THEODORE E. MACK
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been hand delivered to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; and that a copy has been mailed to appellant, Charles Dwight Messer, #025822, Post Office Box 747, Starke Florida 32091 on this the 18th day of June, 1981.

THEODORE E. MACK

Supreme Court of Florida

THURSDAY, OCTOBER 1, 1981

CHARLES DWIGHT MESSER,	**	
Appellant,	**	
	**	
vs.	**	CASE NO. 49,780
	**	
STATE OF FLORIDA,	**	CIRCUIT COURT CASE No. 74-I-21 (Santa Rosa County)
Appellee.	**	
	**	

Upon consideration of the Motion for Rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

JB

cc: Hon. Gerald F. Barnes, Clerk
Hon. M. C. Blanchard, Chief Judge
Theodore E. Mack, Esquire
Wallace E. Allbritton, Esquire

Supreme Court of the United States

No. A-419

CHARLES DWIGHT MESSER,

Petitioner

v.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 30, 19 81.

/s/ Lewis F. Powell, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 13

day of November, 19 81

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trail jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capital felony was committed by a person under the age of 18.

(g) The age of the defendant at the time of the crime.

History.—§[illegible], ch. 19584, 1939; CGL 1940 Supp. [illegible]; §119, ch. 70-339; §1, ch. 72-724; §9, ch. 72-724.

*Note.—Bracketed word inserted by the editors.

Note.—See former §919.23.

erred in directing Petitioner to pay Respondent's attorney's fees and costs, and that it was error for the court to fail to specify the parties' responsibilities regarding the obligations incurred by them during marriage. By adopting such an equal position regarding the parties' indebtedness, the court will insure that women have both equal rights and equal responsibilities and obligations as required by Article X, Section 5, Florida Constitution. We therefore must reverse the District Court of Appeal on this point.

Accordingly, the decision of the District Court of Appeal, Second District, is quashed and the cause remanded for further proceedings consistent herewith.

It is so ordered.

ROBERTS, ADKINS and HATCHETT, JJ., concur.

ENGLAND, J., dissents with an opinion.

OVERTON, C. J., and SUNDBERG, J., dissent and concur with ENGLAND, J.

ENGLAND, Justice (dissenting).

I respectfully dissent. We have no jurisdiction to review the district court's decision. Whatever our personal views may be as to the "justice" of the cause, they are not appropriately expressed at this third judicial level unless there is a "direct conflict" between the district court's decisions and those of other Florida appellate courts. Article V, Section 3(b)(3), Florida Constitution. Here there is none.

The trial court had the responsibility to exercise its discretionary authority to consider all facts necessary to do equity and justice between the parties. Section 61.08(2), *Florida Statutes* (1974). Its decision was reviewed in depth by the district court. A majority of the Court, after reviewing the record for a third time, simply disagrees with the result those lower courts reached. Not only is that disagreement constitutionally improper, it is necessarily made from the least reliable source—a second level appellate record.

I would discharge the writ.

OVERTON, C. J., and SUNDBERG, J., concur.

Charles Dwight MESSER, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 46849.

Supreme Court of Florida.

March 31, 1976.

Defendant was convicted in the Circuit Court, Santa Rosa County, Clyde B. Wells, J., of first-degree murder and robbery and sentenced to death, and he appealed. The Supreme Court, Sundberg, J., held that defendant who did not request mistrial because of courtroom outburst by victim's mother but who emphasized and relied upon such incident in his closing argument could not complain of incident on appeal; and that the failure to allow defendant to submit psychiatric testimony and evidence as to sentence imposed upon defendant's accomplice to jury during sentencing portion of proceeding constituted error, requiring remand of case and impaneling of a special jury to consider improperly excluded evidence.

Convictions affirmed, cause remanded with directions.

1. Criminal Law ⇐659

Disruption which occurred during defendant's closing argument when victim's mother was overcome with emotion and had to be taken from courtroom did not substantially prejudice defendant.

2. Criminal Law ⇐1044.1(3)

Defendant who did not request mistrial because of outburst by victim's mother during defendant's closing argument but who emphasized and relied upon the incident in his argument could not complain of the incident on appeal from conviction.

3. Criminal Law ⇐986, 1177

Although sentence imposed on defendant's accomplice whose actions in striking victim in back of head preceded defendant's firing of fatal shot and who negotiated plea of guilty to second-degree murder was not determinative of sentence to be imposed on defendant upon his conviction of first-degree murder, jury was entitled to consider sentence imposed on accomplice in arriving at its recommendation of sentence to be imposed upon defendant and failure to permit defendant during sentencing portion of trial to submit to jury evidence of accomplice's sentence constituted reversible error. West's F.S.A. § 921.141.

4. Criminal Law ⇐986

Failure to afford defense counsel opportunity to present psychiatric testimony to jury during sentencing portion of murder trial constituted error. West's F.S.A. § 921.141(6)(b).

5. Criminal Law ⇐986

Circuit judge should exercise broadest latitude in admitting evidence during sentencing portion of jury's deliberations. West's F.S.A. § 921.141(1).

6. Jury ⇐71

Where evidence of mitigating circumstances was improperly withheld from jury during sentencing portion of trial, special jury would be impaneled to consider such evidence and make its recommendation to trial court. West's F.S.A. § 921.141(1).

James Ron Shelley, Public Defender, and John W. Fleming, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and Gerald L. Knight, Asst. Atty. Gen., for appellee.

SUNDBERG, Justice.

Appellant, a 29-year-old male, appeals his conviction for first degree murder and robbery and sentence of death. This Court has jurisdiction under Article V, Section 3(b)(1), Florida Constitution, and Section 921.141(4), Florida Statutes. The facts of the case are as follows.

On the morning of November 27, 1973, two hunters discovered the body of a male, 25 to 30 years old, in a partially wooded area called Garcon Point. The hunters called the Sheriff's Department, and subsequent investigation revealed that the body was that of Henry N. Fowler, III, who died of a bullet wound in the brain. In January, 1974, appellant advised Alabama authorities that he wanted to clear his conscience about a Florida killing. The Florida State Attorney traveled to Alabama; when immunity was refused, appellant agreed to "talk" anyway, waiving his *Miranda* rights. He told the State Attorney that he and Ronnie Brown (subsequently his co-defendant) were present when a third man killed and robbed the victim; appellant identified photographs of the victim and the scene of the crime. The following day appellant waived for the second time his *Miranda* rights and made a second statement which was similar to the first but with certain differences; he agreed to travel to Florida in order to point out the location of the crime. On January 23, 1974, appellant visited and identified the scene of the crime; also, he waived his *Miranda* rights for the third time and gave two more recorded statements. In

the meantime, a statement had been taken from co-defendant Brown. According to appellant's final statement, he and Brown had been traveling on the Interstate Highway, he had been drinking liquor and beer, and they stopped at a rest area to look for toilet facilities. When they stopped, they decided to rob the victim, who was asleep in a parked car in the rest area. The pair entered the victim's car, held him up, drove him to several locations; ultimately Brown struck the victim, and appellant shot him once in the head. Brown had previously taken the victim's wallet and watch, and the pair divided $120.00 and disposed of the victim's wallet, personal effects, and car tag.

Appellant was indicted on February 6, 1974, for the first degree murder and robbery of Henry N. Fowler, III. Appellant's motion to suppress confession was heard by the trial court on December 2, 1974, which motion was denied, the court finding that appellant was fully aware of his *Miranda* rights at the time he made his statements, that appellant's statements were not the result of any promise, threat or undue influence, that his statements were freely and voluntarily made, and that appellant intelligently waived his *Miranda* rights. At the close of the suppression hearing appellant's jury trial commenced. On the second day of the trial appellant moved for a mistrial on the ground that two deputies who were witnesses went to lunch with the jury; that motion was denied after court investigation revealed that no discussion about the case occurred between the deputies and the jurors. During the course of the trial appellant's attorney was permitted to place in the record (but not put before the jury) the fact that appellant's co-defendant Brown had entered a plea of guilty to second degree murder and had been sentenced thereon. After the jury found appellant guilty as charged the court proposed to commence the advisory sentencing hearing on the following morning; appellant's attorney objected on the grounds that he had not had sufficient time to prepare for such hearing, but this objection was overruled. During the advisory sentencing hearing, appellant's counsel was not allowed to introduce into evidence a demonstration with a metronome designed to show the jury the severity and length of twenty-five years in prison as a sufficiently severe alternative to the death penalty; this demonstration was ruled inadmissible as being irrelevant to the issue. A majority of the jury recommended the death penalty, which recommendation was followed by the court which sentenced appellant to die in the electric chair. This appeal followed.

We first turn our attention to the fact that an outburst by the victim's mother occurred in the courtroom during appellant's closing argument to the jury. According to the record, appellant's attorney was in the midst of his closing argument when the events with which we are concerned took place. These events are documented in the record as follows:

> "(At this point, a woman seated in the courtroom was overcome with emotion and was taken from the courtroom. It was later determined by the court reporter that this was the victim's mother.)"

Immediately following that notation, the record reveals that appellant's attorney did not object or request a mistrial at this point but, instead, continued his closing statement as follows:

> "That's what we're dealing with right there—a boy is dead, and I want someone to die. It is the same total disregard for life and breath that God gives that led Charles Messer to kill an innocent man in the wilderness."

At this point appellant's attorney requested a break in his argument; a brief recess was taken after which the court recessed for lunch. Thereafter, appellant's attorney continued his closing argument—again without objection regarding the outburst earlier, without having the jury instructed

to disregard it, and without moving for a mistrial. He argued as follows:

> "Just before we broke for the luncheon recess the lady that I think you know who she is because of the questions that were asked you before we selected the jury that's in the box now—there was an outburst, and the court has offered to give an instruction to disregard it because you are not to consider it—that's not something you should consider under the law and instructions of the court. I made a comment just before we broke, and I feel that we have to go back to that comment to pick up the continuity of where I was at . . . . [W]hat we saw there—what was taking place with that lady—is exactly what's involved in whether or not this community is going toward the execution of this defendant. It is called revenge . . . . And that's the point I was trying to make when we had that difficulty before."

In his rebuttal argument, appellant's attorney in referring to the death penalty statute stated as follows:

> ". . . [T]hat's not a bad law. It simply says we will admit the feelings of wrath, of vengence, or resentment, the desire to take the mother of this boy and take her to one side and say, 'we're going to try to make things right . . . .'"

After the jury's verdict of guilty was returned the court held a sentencing hearing. At the beginning thereof the court conducted an evidentiary hearing on a motion for new trial based on the statements made by the victim's mother during the closing argument. The State Attorney did not object to the hearing of witnesses on this matter, stating that he was in the court and could not hear the mother's remarks and that he wanted to clarify for the record whether or not the jury was able to hear her. Three witnesses were examined under oath, the first being a newspaper reporter who testified as follows:

> "A It was during arguments to the jury as to the death penalty. You were making your comments to the jury at that time.
>
> "Q What occurred, sir?
>
> "A . . . I turned to observe Mrs. Fowler being led from the courtroom in tears.
>
> * * * * * *
>
> "A She was the mother of the victim.
>
> "Q Were you able to make out any of the words or anything that she said?
>
> "A No, sir, I was not. I did hear some words being spoken, but it took me in such a surprise that I didn't actually hear myself.
>
> * * * * * *
>
> "A . . . I don't recall observing any emotion the jury might have had.
>
> * * * * * *
>
> "JUDGE: That would put you some 30—35 feet from the jury box yourself, is that correct?
>
> "A Yes, sir.
>
> * * * * * *
>
> "JUDGE: So [Mrs. Fowler] would have been roughly 25 feet from the jury, wouldn't you say?
>
> "A Yes, sir, I would say that.
>
> * * * * * *
>
> "JUDGE: And you didn't understand what she said?
>
> "A No, sir. It was not audible to me.
>
> * * * * * *
>
> "Q . . . Did you feel it was a dramatic outburst?
>
> "A I felt it was. . . ."

The second witness examined was a deputy sheriff who testified as follows:

"Q Did you hear, and can you describe what occurred?

"A I heard a sound, but I cannot describe the words that were said.

* * * * * *

"Q At the time you heard them, could you hear what was said?

"A No, sir. It was not something that I could understand.

* * * * * *

"JUDGE: So you would have been roughly 20 to 25 feet from the lady as she was speaking, is that correct?

* * * * * *

"A Yes. And it would be approximately 20–25 feet."

The third witness examined was an investigator with the sheriff's department who characterized the occurrence as a "disruption"; he stated under oath:

"A . . . There was some statement made to the jury when I observed her or heard her make some statement, which I couldn't put it all together, and then she was taken out of the courtroom. . .

"Q Were you able to hear anything that she did say?

"A I couldn't put it all together, no sir.

"Q Could you give it to us in pieces?

"A . . . She stated, 'How do you know that he done something. . .', and at that point she was taken out of the courtroom, and I couldn't hear the rest of it. She didn't say it all that loud."

The record indicates that, having heard this testimony, and having considered appellant's motion for new trial, the court entered its denial.

We note with interest that on page eight of appellant's own brief he states: "In all candor Appellant concedes that there is ample evidence to sustain the judgment of conviction and that said evidence was properly admitted. Appellant also concedes that there was no substantial prejudice caused by the minor incidents raised in Appellant's assignments of error . . . 4 [relating to the mother's courtroom outburst]."

[1,2] We must agree with appellant's characterization that this event was a "minor incident" which did not substantially prejudice him. We are particularly inclined to this view in light of the fact that appellant's counsel in his argument emphasized both the outburst, which apparently was not heard by the jury, and the revenge motive which allegedly was expressed. Having taken advantage of the situation, appellant may not be heard to complain of it now merely because his argument was not accepted.

We have considered appellant's remaining points on appeal with respect to the verdict and judgment of guilt of the crimes charged and find them to be without merit.

[3] We now turn our attention to the question of whether the death penalty statute was properly applied by the trial court during the sentence advisory hearing portion of the trial.[1] It is our conclusion that the trial court erred in application of the statute in two particulars. First, although there is evidence in the record of the plea-bargained second degree murder sentence received by appellant's accomplice Brown, appellant was not permitted, during the sentencing portion of the trial, to submit this evidence to the jury. We believe the jury was entitled to know that the co-defendant, Ronnie Brown, negotiated a plea of guilty to second degree murder and was sentenced to 30 years imprisonment. See *Slater v. State*, 316 So.2d 539 (Fla. 1975). Although the *Slater* case, *supra*, involved evidence that the "trigger man" was permitted to negotiate a plea for a sen-

1. Fla.Stat. § 921.141 (1973).

tence of life imprisonment, under the facts of this particular case we believe the reasoning of *Slater* applies with equal force. It was there stated, "Defendants should not be treated differently upon the same or similar facts." In the instant case, although the appellant did fire the shot into the head of the victim, this shooting occurred after Brown took a wallet containing $120 and a watch from the victim, then struck him in the back of the head. There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent. The sentence afforded to Brown certainly is not determinative of the sentence which appellant should receive; however, the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation of the sentence to be visited upon the appellant.

[4, 5] Additionally, we believe counsel for the defendant was effectively deprived of establishing an important mitigating circumstance when he was not afforded the opportunity to present psychiatric testimony to the jury during the sentencing portion of the proceedings. Subsection 921.141(6)(b), Florida Statutes, provides as a mitigating circumstance that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." Counsel for the appellant represented to the court that, if given the opportunity, he would come forward with evidence establishing such condition. The expression by the trial court that the verdict of the jury is merely advisory and that he could consider psychiatric reports at the time he performed the actual sentencing, in our opinion, violates the legislative intent which can be gleaned from Section 921.141, Florida Statutes. It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation. Subsection 921.141(1), Florida Statutes, provides in part:

> ". . . In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) [sic] and (7) [sic] [of this section]. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. . . ."

The quoted language indicates that the circuit judge should exercise the broadest latitude in admitting evidence during the sentencing portion of the jury's deliberations.

[6] Accordingly, we are compelled to the conclusion that this cause should be remanded to the trial court for the purpose of conducting another sentencing hearing before a jury impaneled for that purpose at which the evidence improperly excluded may be considered. We recognize that this will result in a hearing before a different jury from that which heard the evidence upon which the verdict of guilty was rendered. However, we find authority for such procedure in that portion of Subsection 921.141(1), Florida Statutes, which states:

> ". . . If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. . . ."

Also, by Chapter 74-379, Laws of Florida, effective October 1, 1974, the following language was added to Subsection 921.141(1), Florida Statutes:

> ". . . If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of

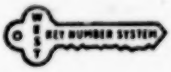
penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. . . ."

Even though the last-quoted provision was not in effect at the time of the offense or at the time the appellant was indicted,[2] it buttresses our conclusion that the proper course in this analogous situation is to impanel a special jury to consider the evidence of aggravating and mitigating circumstances and make its recommendation to the trial court for proper sentencing pursuant to Section 921.141, Florida Statutes.

The judgments of guilt of robbery and of first degree murder are affirmed but the cause is remanded to the trial court with directions to conduct further proceedings consistent with the views expressed herein.

It is so ordered.

OVERTON, C. J., and ROBERTS, ADKINS, BOYD, ENGLAND and HATCHETT, JJ., concur.



The DIVISION OF BEVERAGE of the STATE of Florida, DEPARTMENT OF BUSINESS REGULATION, Appellant,

v.

FOREMOST-McKESSON, INC., a corporation, Appellee.

No. 47334.

Supreme Court of Florida.

March 31, 1976.

Liquor distributor sought, inter alia, declaration that it was entitled to renewal of its license to distribute liquor in Florida. The Circuit Court for Leon County, Hugh M. Taylor, J., ruled that distributor was entitled to benefit of grandfather clause of governing statute, and appeal was taken to the District Court of Appeal. A motion to transfer the appeal was granted. The Supreme Court, Hatchett, J., held that under grandfather clause, which provides that any corporation holding a license as a distributor on June 3, 1947 is entitled to renewal thereof, notwithstanding statutory ban on licensing of out-of-state manufacturers or association of a Florida manufacturer with an out-of-state manufacturer, etc., applied to all distributors holding license as of June 3, 1947 without regard to whether distributor was then affiliated with an out-of-state rectifier, etc., and that a distributor so licensed was entitled to renewal of its license notwithstanding that it engaged in the prohibited affiliation after June 3, 1947.

Judgment affirmed.

England, J., dissented with opinion.

Adkins, J., dissented on the merits and concurred with England, J., on jurisdiction.

Intoxicating Liquors ⇐102

Provision of grandfather clause of liquor licensing statute that any corporation which held a license as distributor on June 3, 1947 was entitled to a renewal thereof notwithstanding statutory ban on licensing of out-of-state manufacturers or association of a Florida manufacturer with an out-of-state manufacturer, etc., applys to all distributors holding a license as of such date without regard to whether the distributor was then affiliated with an out-of-state manufacturer, etc.; a distributor so licensed is entitled to a renewal of its license notwithstanding that it engaged in the prohibited affiliation only after June 3, 1947. West's F.S.A. §§ 561.24, 561.24(5).

2. *Castle v. State*, 330 So.2d 10 (Fla.1976).

STATE OF FLORIDA, +

Plaintiff, +

Vs. +

CHARLES D. MESSER, +

Defendant. +

SENTENCING VERDICT

A majority of the Jury advise and recommend to the Court that it impose the death penalty upon the Defendant, Charles Dwight Messer.

Claude Russell
FOREMAN

May 26 1976
date

Filed May 26, 1976
H. F. Barnes Clerk

FILED FOR RECORD THIS 26
DAY OF May A.D.
19 76 AT O'CLOCK
M AND RECORDED IN VOL T
AT PAGE 190 OF Crim Ct
RECORD VERIFIED.
H. F. Barnes
CLERK CIRCUIT COURT
BY Louise McKellar
DEPUTY CLERK
SANTA ROSA COUNTY, FLORIDA

CERTIFIED A TRUE AND CORRECT COPY
GERALD F. BARNES
CLERK CIRCUIT COURT
By Louise McKellar, D.C.

F-1

STATE OF FLORIDA

UNIFORM COMMITMENT TO CUSTODY OF DIVISION OF CORRECTIONS

IN THE CIRCUIT COURT IN AND FOR
(Court)

SANTA ROSA County. SPRING Term, 19 76

Conviction for First Degree Murder and Robbery
(Offense)

Date of conviction January 3, 1975

Date of sentence imposed June 1, 1976

Term of sentence Death in the Electric Chair

STATE OF FLORIDA,

Plaintiff,

vs.

CHARLES DWIGHT MESSER
Defendant.

"Case No. 74-I-21"

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

XXXXX
(Indictment) (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable C. Joe Bullock

Judge of said Court, as also GERALD F. BARNES

Clerk, and the Seal thereof, this the 1st day of June, 19 76

Herald F. Barnes
Clerk of said Court

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

CERTIFIED A TRUE AND CORRECT COPY
GERALD F. BARNES
CLERK CIRCUIT COURT
By Virginia W. Bullock
DEPUTY CLERK

23

F-2

STATE OF FLORIDA, :

Plaintiff :

vs. : 74-I-21

CHARLES D. MESSER, :

Defendant. :

.. ..

FILED
CLERK'S OFFICE

FINDINGS OF FACT

Pursuant to Section 921.141(3), the Court makes the following findings of fact which constitutes the justification for the imposition of the sentence herein administered:

a. That the crime of First Degree Murder was committed while the Defendant was in the process of committing the crime of robbery (for which he has likewise been convicted).

b. That the crime was committed for pecuniary gain in that the Deceased was robbed of $120.00, and other property at the time of the commission of this offense.

c. That the murder was committed in a manner the Court finds to be especially atrocious and cruel in that the victim was taken in his automobile at gun point to two different locations, was required to get into the trunk of his automobile where he was transported, repeatedly told the Defendant he had no intentions of resisting, and finally was hit over the head and shot and left to die in the woods.

d. That by the Defendant's own statement his last 15 years were devoted to criminal behavior, but specifically finds that the Defendant was previously convicted of the crime of manslaughter.

e. That the Defendant was the leader of the two co-defendants, and that the sentence received by the Defendant, Brown, (which was not passed by this Court) is not a justification for this Defendant receiving a lesser sentence.

f. The Court has reviewed those mitigating circumstances contained in Section 921.141(6)(a) through (g), and finds that none of those mitigating circumstances are present. In making this finding, the Court has considered the

testimony of the two clinical psychologists and the psychiatrist who testified, none of whom diagnosed the Defendant to have been suffering any extreme mental or emotional disturbance at the time of the commission of the offense.

Based on the above findings, the Court concludes that sufficient aggravating circumstances exist to require the sentence of death in the electric chair, and that no mitigating circumstances exist which would allow this Court to reduce that sentence to life imprisonment.

will hear no evidence on that, but will consider that as a fact.

JOHNSON: Your Honor, at this time the State would call Mr. Curtis Golden as a witness.

RECESS

SHELLEY: Your Honor, Mr. Curtis Golden, for the purpose of the record, is the State Attorney for the First Judicial Circuit. He has been called as a witness on behalf of the State. We feel that, of course, he can testify as to the disposition of the co-defendant's case, but if he seeks to give his reason for the negotiation he must be restricted in that effort to introducing evidence by means of his assistant in the courtroom, rather than testifying as to his reasons. Is my point clear to the court?

JUDGE: No.

SHELLEY: The State Attorney -- I have taken his deposition. I have a copy of it here, and the State has a copy. He rationalized his negotiation for accepting a plea to second degree on many factual matters. For instance, the candidness and extent of Brown's confession. Ronnie Brown was of low intelligence and only had an eighth grade education. Brown was a follower rather than a leader. That Charles Messer had a two year education -- was aggressive.

Those are the major points. Now, we have no objection, of course, if the State wishes to produce evidence on the point of Mr. Brown's education or Mr. Messer's education, or any of these other points -- if he wants to produce evidence of his leadership -- but the argument should come at the close of all the evidence rather than under oath and from the witness stand.

We feel that the State Attorney rationalized his negotiation. My deposition did not ask for that rationalization. No one has the authority to ask him that question. If he wanted to volunteer it, he could, but that I was not to inquire.

JUDGE: You consider it would be improper for the State now to illicit his reasons for making the decision as an elected official to do what he did, i.e., to grant...

SHELLEY: To accept a plea to second degree, that the only alternative would be for him, by his assistant, to introduce evidence to the facts of that rationalization, and then to have his assistant argue those facts to the jury at the close of the evidence.

JUDGE: What evidence could he put on, for instance, as to the aggressiveness of Messer as opposed to the aggressiveness of Brown?

SHELLEY: This is precisely my point, Your

Honor. There is no way I can cross examine such statements.

JUDGE: It would be an opinion, wouldn't it?

SHELLEY: Yes, sir. And his opinion should be expressed, I suppose, if it is at all, in the manner in which the prosecution takes place, and the evidence is introduced, and the arguments of counsel at the close of all the evidence.

JUDGE: Mr. Johnson, do you want to respond to that?

JOHNSON: Yes, Your Honor. One of the mitigating circumstances under the Florida Statute, Section 921.141, is that the defendant for one thing had no significant history of prior criminal activity. Ronnie Brown had never been arrested before in his life.

Another mitigating circumstance is the fact that...

SHELLEY: We have no objection to evidence from the witness stand as to no prior record, but that certainly can't come from Curtis Golden whose only information must be hearsay. There is no way for us to cross examine.

JOHNSON: And under Sub-section 6-C, "Defendant acted under extreme duress or under substantial domination of another person." I think that Mr. Golden

can testify that their investigation revealed that Defendant Messer was the primary perpetrator of this crime, and that Brown acted under domination of Messer.

SHELLEY: That, of course, is subject to argument -- closing argument -- for the jury to consider, but not to receive it in testimony from the stand.

JUDGE: Well, it appears to me that Mr. Golden would have the same right or responsibility to tell the basis upon which he accepted that negotiated deal as he did in making the deal to start with. The court has cast upon us the burden to require the jury to hear that evidence, i.e., that the co-defendant did get a negotiated deal, and so in furtherance of that evidence I think it is incumbent upon this court to hear the reason why, and since Curtis Golden apparently made that decision then I think it is incumbent upon him to tell the jury why he made it, and let them weigh that along with the other. So, I would allow it to be made.

SHELLEY: Your Honor, I accept the court's ruling. However, because I was reprimanded by the Supreme Court for not timely moving for a mistrial, and I don't want to disrupt the procedure here, but I do want to state that his testimony, if it is given, could result in a mistrial. So, I would move at this

time, rather than interrupting Mr. Golden's testimony, to make that motion in the presence of the jury. In the alternative, if the court feels that that motion shouldn't be made, then we would ask that immediately upon my objection that the court ask the jury to step out so that I can formally move for mistrial, and let the court rule on that.

JUDGE: All right. Bring the jury in.

JURY RETURNED TO BOX

JOHNSON: The State would briefly call back Mr. Knapp.

* *

R I C H A R D K N A P P, having been recalled to the stand, testified as follows, to wit:

EXAMINATION BY

MR. JOHNSON:

Q You are the same Mr. Knapp that testified previously in this case, is that correct?

A Yes, sir.

Q There are a couple of things I neglected to ask you that I would like to bring out at this time. Do you recall what Henry Fowler was wearing at the time that he left you?

A He had on a white karate jacket.

Q I show you what has been marked as State's Exhibit

Q And that is the reason you did not consider...

A That is the reason, and the reason I have never relied upon those in my investigations.

Q During the course of your investigation did you have the occasion to learn how co-defendant Brown met the defendant Messer?

A Yes, sir, it is my understanding that they met while Mr. Messer was incarcerated in jail in Bonifay, Florida.

Q Do you know how it came about that Brown met Messer there, sir?

A It is my understanding that Mr. Brown's brother-in-law was a juvenile counselor in Bonifay, and it was through the visits of Mr. Brown to the jail while Mr. Messer was in jail that he met him.

Q During the course of your investigation, sir, did you have the occasion to learn who was apparently the leader in this criminal activity?

A Yes, sir. In talking with Mr. Messer and talking with Mr. Brown in investigating this matter it became obvious to me that Mr. Messer was the more intelligent of the two. Mr. Brown had an eighth to tenth grade education. He was of rather low intelligence. He seemed to be the type of person who was a follower. Mr. Messer on the other hand was a leader, and it appeared that at all times that the defendant Mr.

Messer was the one who was the dominant influence in the relationship.between the two.

SHELLEY: Excuse me, Mr. Johnson. At this time I renew my motion that was raised yesterday in regard to arguing before the court. If the court will rule, rather than taking the jury out of the jury box...

JUDGE: Denied.

Q Mr. Golden, did any of these reasons have bearing on the reason you accepted a plea to second degree murder by the co-defendant Brown?

A Yes -- those and other reasons.

Q What were those other reasons?

A Well, as I stated before, Mr. Brown had no previous record of criminal activity prior to the time he met Mr. Messer. This particular reason -- and also, it was actually through Mr. Brown's cooperation and his statement that we were able to solve this case and arrive at the truth. It is true that Mr. Messer first mentioned the fact he was a witness, and it was through his statement to Mr. Mannis that we were able to determine that he and Mr. Brown were suspects in the case, but it was not through his cooperation that we solved the case: it was through the cooperation of Mr. Brown. Mr. Brown was very remorseful about it. He cried quite a bit in

the interview at the time that he told us about it, and he was quite cooperative. And it was for these reasons that I felt that these mitigating circumstances outweighed or neutralized the aggravating circumstances in the case. And, under the law, if a person is convicted of first degree murder and the jury recommends mercy, and the judge accepts that, then the penalty is life imprisonment. Under the law the maximum penalty for second degree murder is life imprisonment. So, I felt that rather than to -- I felt that the mitigating circumstances neutralized the aggravating circumstances in his particular instance. And, I felt for that reason that the jury in all probability would recommend mercy, and the judge would probably grant that, and I felt that there was no reason to put the State of Florida to the expense of trying him if he would plead guilty to second degree murder and his maximum penalty could be the same as under first degree. So, I accepted the plea to second degree murder with the opinion that he would in all probability receive life imprisonment.

Q Was there any negotiation between the State of Florida and Defendant Brown as to what sentence he would receive?

A There was absolutely no negotiations whatsoever. The only negotiation was that the State of Florida would

allow him to plead guilty to second degree murder, and it would be left to the court to determine what the sentence would be, and I was of the opinion at that time that it would in all probability be life imprisonment.

Q But, in fact, he received a lesser sentence, is that correct?

A That is correct. He received 30 years in prison, but this was not due to any negotiation on the part of the State of Florida.

Q He entered a plea with no recommendation from the State of Florida, is that correct?

A That is absolutely correct.

Q And that was Judge Wade that sentenced that defendant instead of Judge Wells, is that right?

A I believe that's correct.

Q You mentioned remorse on the part of Defendant Brown. Is there any remorse on the part of the Defendant Messer?

A Absolutely not -- not one note of remorse in his voice as he told about it.

Q Would you describe it as maybe an attitude of contempt for the deceased?

SHELLEY: Your Honor, the objection will be renewed throughout, rather than interrupt you

in testimony. It is impossible to rebut this type of evidence. There is no way we can cross.

JOHNSON: Your Honor, according to the statute it is not limited to the strict rules of evidence in normal proceedings.

SHELLEY: I'm not asking for strict rules of evidence. I'm just asking for an opportunity -- let me understand your ruling?

JUDGE: The court has ruled that it will allow questioning regarding the physical characteristics demonstrated by Defendant Messer and the Defendant Brown, but it is going a little far when you get into the area of the law when it is the prerogative of the court to do that.

With that in mind, you may proceed.

BY MR. JOHNSON:

Q Was there any particular reason, Mr. Golden, why you didn't negotiate a plea to second degree murder with Defendant Messer?

A Yes, sir, there was.

Q What was that?

A Well, for one thing there were four aggravating circumstances detailed by the statute present. It was a

heinous and cruel...

SHELLEY: Your Honor, at this time we would renew the objection...

JUDGE: That objection will be sustained.

SHELLEY: Thank you.

Q You started renumerating, sir -- there were aggravating circumstances in your opinion, is that correct?

A That is correct. Yes, sir.

Q Itwas for this reason that no ...

SHELLEY: Your Honor, he is continuing to do the same thing. The court just sustained my objection.

JUDGE: I will let him express his opinion that they were aggravating circumstances, but the jury will draw their own conclusions as to whether or not they were aggravating circumstances and what they were.

A Mr. Johnson, I found no mitigating circumstances.

Q And it is for this reason he was prosecuted for the crimes he was charged with?

A That is correct.

JOHNSON: Thank you. That is all.

JUDGE: Mr. Golden, was it part of your agreement with Brown that he testify against co-defendant Messex?

A No, sir, it was not.

Supreme Court of Florida

No. 49,780

RECEIVED
APR 30 1979
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

CHARLES DWIGHT MESSER, JR., Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 26, 1979]

PER CURIAM.

Charles Dwight Messer was convicted in the Circuit Court of the First Judicial Circuit, in and for Santa Rosa County, of the crimes of murder in the first degree and robbery. The trial court judge, adopting the recommendation of the jury, sentenced the appellant to death. On appeal to this Court, the judgments of conviction were affirmed but the sentence of death was vacated and the case remanded for a second trial on the issue of sentencing.[1] Pursuant to section 921.141(1), Florida Statutes (1973), a jury was impaneled to hear evidence and render a second advisory sentence. Again the penalty of death was recommended and the recommendation was followed by the trial court judge. This Court has jurisdiction of the appeal and must review the propriety of the sentence of death.[2]

The facts of the case appear in this Court's earlier opinion. The appellant and an accomplice found the victim sleeping in a car at an interstate highway rest area. They robbed him and took him by automobile to a wooded area. There the accomplice struck the victim and the appellant shot him in the head with a pistol.

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[1] Messer v. State, 330 So.2d 137 (Fla. 1976).

[2] Art. V, § 3(b)(1), Fla. Const.; § 921.141(4), Fla. Stat. (1975).

Our decision to remand for a second sentencing trial was based on two grounds. We held that the appellant was entitled to present to the jury psychiatric testimony relevant to the statutory mitigating circumstance: "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." § 921.141(6)(b), Fla. Stat. (1973).

We also said that it was improper for the court to have kept from the jury evidence of the disposition of the case against the accomplice. The accomplice negotiated a guilty plea to a charge of second-degree murder and was sentenced to thirty years' imprisonment. Citing the case of Slater v. State, 316 So.2d 539 (Fla. 1975), we observed, "There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent." While pointing out that the sentence imposed on the accomplice is certainly not determinative of what sentence should be imposed on the appellant, we said that "the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation . . . ." Messer v. State, 330 So.2d 137, 142 (Fla. 1976).

Section 921.141(1), Florida Statutes (1973), provides that in the sentencing proceeding, "evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6)[sic] and (7)[sic] of this section." The process of weighing of circumstances by the jury is strictly limited with regard to what evidence tending to aggravate the capital felony may be admitted. "[R]egardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation . . . ." Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). But the process should embrace all matters tending to mitigate the punishment. Cf. Lockett v. Ohio, _____U.S._____, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978)(plurality opinion); Songer v. State, 365 So.2d 696, 700 (Fla. 1978)(on rehearing).

At the second sentencing proceeding, the court allowed the state to present the testimony of the state attorney, explaining the

factors behind his decision to negotiate a plea of guilty of second-degree murder in the case of the accomplice while prosecuting the appellant for first-degree murder and seeking the death penalty. The appellant now contends that this was improper.

The state sought to present this testimony in order to counter any inference, unfavorable to the state's case on the issue of sentence, that the jury might draw from being informed of the final disposition of the charges against the accomplice. The testimony also tended to negate various statutory mitigating circumstances. We hold that the state attorney's testimony was relevant for these purposes and was properly admitted.

The trial court judge, as is required by the capital felony sentencing law, section 921.141, Florida Statutes (1973), issued written findings of fact in support of the sentence of death. Upon our independent review of the record, we find that there was sufficient evidence to prove beyond a reasonable doubt the existence of two statutory aggravating circumstances, previous conviction of a felony involving violence to the person and that the capital felony was committed in the course of a robbery. These appear as paragraphs (b) and (d) of section 921.141(5), Florida Statutes (1973). The previous conviction was properly admitted and considered even though it occurred after the capital felony for which the sentence was imposed. Elledge v. State, 346 So.2d 998 (Fla. 1977).

We find further from the record that there was no evidence tending to establish the existence of any mitigating factors. The sentence of death was proper. Alford v. State, 307 So.2d 433 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973).

Accordingly, the sentence of the circuit court is affirmed.

It is so ordered.

ENGLAND, C.J., ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Santa Rosa County,

Clyde B. Wells, Judge - Case No. 74-I-21

Theodore E. Mack, Assistant Public Defender, Tallahassee, Florida,

for Appellant

Jim Smith, Attorney General; and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

CHARLES DWIGHT MESSER,	:	
Appellant,	:	
v.	:	CASE NO. 49,780
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

PETITION FOR REHEARING

Petitioner, CHARLES DWIGHT MESSER, by his undersigned counsel, hereby petitions this Court pursuant to Florida Appellate Rule 3.14 to grant rehearing on the issues raised in this appeal, and petitioner respectfully suggests that this Court omitted or neglected to fully consider the following:

A. Defendant's Pending Motion To Clarify And The Failure Of The Trial Court To Provide The Pre-Sentence Investigation Report.

On June 16, 1977, this Court directed the trial judge below to file a response stating whether he imposed the death sentence in consideration of any information not known to appellant. This Court also directed the trial judge to furnish copies of his response along with copies of any sentencing information to the Court and both counsel for the state and counsel for appellant. This directive was issued by this Court pursuant to Gardner v. Florida, 430 U.S. 349 (1977).

On September 26, 1977 the trial judge issued his response stating twice that he had considered a pre-sentence investigation report and further stating that he was ordering the Clerk of the Court to send copies of that report along with copies of psychiatric and psychological reports to this Court. Upon receipt of the trial judge's response, counsel for appellant timely

filed, on October 3, 1977, a motion in this Court requesting that the trial judge be required to clarify his response to indicate whether these reports had been furnished to appellant or his trial counsel. This was necessary because although the trial judge had indicated that he saw a pre-sentence investigation report, he did not state whether that report had been furnished to the defendant or trial counsel. As of this date, counsel for appellant has received no reponse to his motion, has received no response from the trial judge, and no copies of the reports have been filed in this Court or furnished to counsel for appellant.

Pursuant to Florida Appellate Rule 3.9, counsel for appellant had the right to believe that the proceedings in this cause were suspended until his motion was disposed of or at the very least, until this Court had reviewed the reports and determined whether there had been a violation under Gardner, supra. However, on April 26, 1979, this Court issued its opinion affirming appellant's conviction with no mention, whatsoever, of the possible Gardner violation. Counsel for appellant, upon receiving this opinion, checked his file and then checked this Court's file to determine what action, if any, had been taken pursuant to his motion. Upon reviewing this Court's file, counsel for appellant could find no action taken on his motion, no pre-sentence investigation or psychiatrical reports, and by checking the Clerk's docket, could find no indication that any such reports had been furnished to the Court. This Court's records do contain a letter from someone stating that they had no pre-sentence investigation report on appellant. This, however, does not mean that such a report was not prepared and certainly does not explain the trial judge's

emphatic response that he had reviewed such a report. Appellant would contend that such facts warrant a full hearing at the trial level to determine exactly what happened to the pre-sentence investigation report and to determine exactly what the trial judge considered at sentencing that was not furnished to appellant or his trial counsel. Since Gardner, supra, seems to require not only a disclosure of such a pre-sentence investigation report but also a review of that report by this Court, it is essential that the report be provided as ordered by the trial judge. Until a determination has been made by the trial court on this matter, all proceedings in this case should be stayed and this Court should withdraw its opinion of April 26, 1978, pending a full review of the possible Gardner violation.

B. Secret Psychological Report Ordered By This Court

It must also be noted here in appellant's petition for rehearing that while reviewing this Court's record on appeal in this case, counsel for appellant found a copy of a letter from this Court to the Department of Offender Rehabilitation requesting a copy of the latest psychological report pertaining to the appellant. No copy of this letter was ever furnished to counsel for appellant. Counsel for appellant is aware that the Florida State Prison conducts psychological screening reports on all new inmates. Counsel for appellant also has personal knowledge that in other death cases pending before this Court, that this Court has requested and received such psychological reports without appellate counsel being notified. Upon finding a copy of this letter in the Court file, counsel for appellant attempted to determine if this Court had received such a report but counsel was informed that after the Gardner decision, all death cases were "purged" of such

information.

Under these circumstances, counsel for appellant would request that this Court conduct a full hearing of its own to determine whether or not the psychological screening report was received and the date on which it was received by this Court, when and under whose direction that report was destroyed, and whether or not that report was read and considered by any members of this Court.

Counsel for appellant feels that he must raise this question in his petition for rehearing in order to avoid any waiver of his client's rights. It is apparant, however, that this Court's actions have raised a question that must be resolved pursuant to Gardner, supra, to determine whether the death sentence was imposed on appellant, at least in part, on the basis of a record containing information of which he had no knowledge or opportunity to deny or explain.

It is clear that any secret report is not permissible in death penalty proceedings and violates the process which the defendant is due in such cases. See Gardner, supra, at page 360. Review by this Court is clearly part of the procedure employed in this state for determining which persons receive the death penalty. As noted by Justice White in his concurrence Gardner, supra, at 364:

> "A procedure for selecting people for the death penalty which permits consideration of such secret information relevent to the 'character and record of the individual offender,' . . . [Woodson v. North Carolina, 428 U.S. at 304], fails to meet the 'need for reliability in the determination that death is the appropriate punishment' which the Court indicated was required in Woodson, supra, at 305."

It should also be noted that if psychological reports were before the Court in any other cases then

Gardner is applicable. As pointed out in Gardner, supra, at 361:

> "Since the state must administer its capital sentencing procedures with an even hand, see Proffit v. Florida, 428 U.S., at 250, it is important that the record on appeal disclosed to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida Capitol Sentencing Procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia."

C. Allowing Opinion Which Reaches The Ultimate Issue Being Determined To Be Offered By Jury To Prosecutor.

Concerning this Court's opinion filed on April 26, 1977, in the above styled cause, counsel for appellant would respectfully point out that by determing that the State Attorney could give his opinion as to aggravating and mitigating circumstances present, this Court not only failed to point out what rule of evidence allowed such testimony, it also failed to recognize that by making such a ruling it was overturning long-standing case law on the subject. As recently as this year, the Second District Court of Appeal had pointed out in Mills v. State, 367 So.2d 1068, 1069 (Fla. 2nd DCA, 1979) that:

> "A non-expert witness may not express opinions or conclusions which the jury could draw from the facts to which he had testified."

Moreover, the court in Mills pointed out that such error was clearly reversible because the opinion dealt with the ultimate issue to be decided.

In the sentencing portion of a death case, the ultimate issue to be determined by the jury is what aggravating and mitigating circumstances exist and whether or not the aggravating circumstances outweigh the mitigating circumstances. By allowing the

State Attorney's opinion testimony on the ultimate issue to be decided this Court has either: (1)overruled the long-standing case law pertaining to such testimony or (2) determined that error which would otherwise be reversible in other types of criminal cases is not reversible in a death case.

D. Allowing Testimony To Negate Mitigating Factors.

In determining that it was proper for the State Attorney to take the stand and testify at the second sentencing hearing, this Court stated at page three of its opinion:

> "The state sought to present this testimony in order to counter any inference, unfavorable to the state's case on this issue of sentence, that the jury might draw from being informed of the final disposition of the charges against the accomplice. The testimony also tended to negate various statutory mitigating circumstances. We hold that the state attorney's testimony was relevent for these purposes and was properly admitted." (emphasis added)

After finding that it was proper for the State Attorney to testify in order to negate various mitigating circumstances, this Court goes on to find at page three:

> "We find further from the record that there was no evidence tending to establish the existence of any mitigating factors. The sentence of death was proper."

Counsel for appellant is in a quandary as to why, if there were no mitigating factors, would the State Attorney be allowed to testify to negate them. On the other hand, if the State Attorney had to be allowed to testify to negate mitigating factors, then evidence of mitigating factors must have been present that the jury could have considered. It appears as if the decision allows the State to have its cake and eat it too. The problem can be resolved in one of two ways, either by finding that no mitigating factors

existed, thus requiring a new sentencing proceeding wherein the State Attorney would be prohibited from testfying, or, in the alternative, by finding that mitigating factors did exist, in which case a new sentencing hearing is required based on the fact that this Court had ruled out but all two of the aggravating factors argued below. See Elledge v. State, 346 So.2d 998 (Fla. 1977).

The State Attorney's testimony raises an additional problem when this Court allows the State to negate mitigating factors that the Court finds do not exist. If this Court allows its decision to stand, the state will hereafter be allowed to argue at sentencing proceedings the absence of mitigating factors. Such a ruling directly conflicts with this Court's decision in Mikenas v. State, 367 So.2d 606 (Fla. 1978). In that decision, this Court held that it was error for the trial judge to consider a non-statutory aggravating circumstance which was the antithesis of a mitigating circumstance. In so doing, this Court declared that it was improper to consider the lack of a mitigating circumstance as an aggravating circumstance. In this instant case, to allow the State to negate mitigating factors which this Court determined do not exist, is the same as allowing the State to argue the lack of mitigating factors as an aggravating factor. This is in direct conflict with Mikenas.

E. Erroneous Resolution Of Aggravating/Mitigating Issues.

Finally, counsel for appellant would urge that this Court's elimination of all but two aggravating circumstances requires that appellant be remanded to trial court for a new sentencing proceeding. Obviously, the State and this Court believe that there was

sufficient evidence of mitigating factors present as shown by the fact that the State was permitted to present the State Attorney's testimony to negate those factors. Indeed, the testimony of Dr. McMahon, alone, was sufficient to give the jury reason to find one mitigating circumstance, that of impairment of appellant's capacity to appreciate the criminality of his conduct. See Shue v. State, 366 So.2d 387 (Fla. 1978). This Court cannot stand as the trier of fact and determine that the sentencing jury did not consider Dr. McMahon's testimony of appellant's mental state as establishing a mitigating factor to be wieghted against the aggravating factors presented, since no specific findings were returned by the jury. As pointed out by this Court in Shue v. State, supra:

> "It is impossible to say that there was no reasonable basis for the jury to have concluded that some mitigating circumstances existed sufficient to outweight the aggravating circumstances."

Furthermore, as the United States Supreme Court has pointed out in Lockett v. Ohio, ___ U.S. ___, 98 S.Ct. ___, 57 L.Ed.2d 973, 990 (1978):

> . . . "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

In the instant case it is entirely possible that the jury considered at least one mitigating circumstance to be weighted against the several aggravating circumstances presented by the State because evidence of such a mitigating factor was presented to them. Since this Court has corrected the trial court to show that only two aggravating factors could have existed, the aggravating and

mitigating factors must now be placed back before the jury to determine if the mitigating factors now outweight the aggravating.

WHEREFORE, appellant prays this Court will grant re-hearing in this case, require hearings on the Gardner issues presented, and remand this case for a new sentencing proceeding in accordance with this Court's findings relating to the aggravating and mitigating circumstances present.

Respectfully submitted,

THEODORE E. MACK
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was furnished by hand-delivery to the Honorable Jim Smith, Attorney General, the Capitol Building, Tallahassee, Florida, on this 10th day of May, 1979.

THEODORE E. MACK

Charles Dwight MESSER, Appellant,

v.

STATE of Florida, Appellee.

No. 49780.

Supreme Court of Florida.

Nov. 8, 1979.

On Rehearing June 5, 1980.

Appeal was taken from death sentence imposed by the Circuit Court, Santa Rosa County, Clyde B. Wells, J. The Supreme Court held that: (1) a hearing held to determine whether death sentence was imposed in consideration of any information not disclosed to defendant was critical stage of criminal proceedings at which defendant was entitled to be represented by counsel, and (2) public defender was directed to represent defendant at further hearing on remand.

Order accordingly.

1. Criminal Law ⇐641.3

A hearing held to determine whether a sentence of death was imposed in consideration of any information not disclosed to defendant was critical stage of criminal proceedings at which defendant was entitled to be represented by counsel.

2. Criminal Law ⇐1077.3

When Supreme Court, during pendency of appeal from judgment imposing sentence of death, orders hearing on issue of whether sentence was imposed in consideration of any information not disclosed to defendant, such hearing is part of appellate process and it is proper for appointed appellate counsel to represent defendant at such hearing.

Theodore E. Mack, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Wallace E. Allbritton, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

The decision and opinion rendered by the Court on April 26, 1979, are withdrawn.

This case was previously before the Court on appeal. Art. V, § 3(b)(1), Fla.Const. The sentence of death was vacated and the case remanded for a second sentencing trial. *Messer v. State*, 330 So.2d 137 (Fla.1976). The second sentencing proceeding resulted in a sentence of death and this appeal followed.

Subsequently, following the decision in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court issued an order on June 16, 1977, requiring the trial judge to state whether he imposed the death sentence in consideration of any information not known to the appellant and to furnish this Court with any presentence investigation reports and other reports which were before him for consideration in imposing sentence.

On September 26, 1977, the trial judge filed a response stating that at sentencing he had before him a presentence investigation report and that it contained no information not known to the appellant at the time of sentencing. The response did not state whether a copy of the report was furnished to the appellant, nor was it accompanied by a copy of the report when filed with this Court.

Previously, on March 30, 1977, this Court had ordered the Parole and Probation Commission to furnish a copy of the presentence investigation report. The Commission's response of April 5, 1977 stated that it had no record of a presentence investigation conducted on the appellant.

A communication from the Clerk of the Circuit Court for Santa Rosa County, dated October 11, 1977, states that all reports before the court at sentencing were transmitted to this Court with the record on appeal. It specifically states that there was no presentence investigation ordered.

The appellant has moved that we require clarification of the trial judge's response to our *Gardner* order. In light of the above-

recited facts, we have decided that a clarification is necessary.

The trial court is directed to hold a hearing to determine whether the sentence of death was imposed in consideration of any information not disclosed to appellant or any reports not furnished to him prior to sentencing. The court will report its findings to this Court within sixty days of receipt of this order.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON and SUNDBERG, JJ., concur.

On Rehearing

PER CURIAM.

The Court having considered the trial judge's response to our November 8, 1979, order directing a hearing on the question of a possible violation of the rule of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and the appellant's motions in reference thereto, it is hereby concluded and adjudged that:

[1] A hearing held to determine whether a sentence of death was imposed in consideration of any information not disclosed to the defendant is a critical stage of the criminal proceedings, at which the defendant is entitled to be represented by counsel.

Therefore, the trial court erred in concluding that there was no need for the appellant to have legal representation at the hearing.

[2] When this Court, during the pendency of an appeal from a judgment imposing a sentence of death, orders a hearing on the issue of whether the sentence was imposed in consideration of any information not disclosed to the appellant, such hearing is a part of the appellate process and it is proper for appointed appellate counsel to represent the appellant at such hearing.

The trial court shall hold a further hearing to determine whether the sentence of death was imposed in consideration of any information not disclosed to the appellant or any reports not furnished to him prior to sentencing, and the Public Defender of the Second Judicial Circuit is hereby directed to represent the appellant at the hearing.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., concur.

INTERNATIONAL PAPER CO., Petitioner,

v.

Oscar McKINNEY, Respondent.

No. 55995.

Supreme Court of Florida.

May 29, 1980.

Employer sought a writ of certiorari to quash an order of the Industrial Relations Commission awarding attorney fees. The Supreme Court, Adkins, J., held that where employer initially controverted the claim to temporary disability but paid the claim as ordered, and when employee reached maximum medical improvement employer voluntarily paid permanent disability, employee's attorney was not entitled to additional attorney fees based upon the permanent benefits obtained.

Order quashed; cause remanded with instructions.

1. Workers' Compensation ⇐1981

Where employer initially controverted employee's claim to temporary disability, claim was allowed and claimant's attorney was awarded fee, employer paid temporary disability as ordered, when employee reached maximum medical improvement employer voluntarily began payment of per-

NO 81 5944

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES DWIGHT MESSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RECEIVED
DEC 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

CHARLES DWIGHT MESSER, petitioner in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
P. O. Box 671
Tallahassee, Florida 32302
(904) 488-2458

Counsel for Petitioner

(Member of the Bar of this Court)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES DWIGHT MESSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RECEIVED
DEC 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

I, CHARLES DWIGHT MESSER, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to the redress I seek in said cause.

Charles Dwight Messer
CHARLES DWIGHT MESSER

STATE OF FLORIDA

COUNTY OF BRADFORD

The foregoing affidavit of CHARLES DWIGHT MESSER was subscribed and sworn to before me this 3 day of Nov, 1981.

J W Warren
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 4, 1982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Charles Dwight Messer, #025822, Florida State Prison, P. O. Box 747, Starke, Florida, 32091; and by hand delivery to Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 23 day of December, 1981.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

81 5944

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida and to Mr. Charles Dwight Messer, #025822, Florida State Prison, P. O. Box 747, Starke, Florida 32091, this 23 day of December, 1981.

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
P. O. Box 671
Tallahassee, Florida 32302
(904) 488-2458

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